`'United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum



DATE: September 14, 2012

TO:

Cornele A. Overstreet, Regional Director

Region 28

FROM:

Barry J. Kearney, Associate General Counsel

Division of Advice

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SUBJECT: Charles Schwab Corporation

Case 28-CA-084931

512-2017-1700

512-4067-9500

The Region submitted this case for advice on whether the Employer has unlawfully maintained a rule that prohibits employees from soliciting or encouraging their fellow employees to terminate their employment with the Employer. We conclude that this rule does not violate the Act because it would not reasonably be construed by employees to restrict protected activity.

## FACTS

Charles Schwab Corporation (the Employer or Schwab) provides securities brokerage, banking, and related financial services and employs over 13,000 employees nationwide. The Employer requires its employees to sign a "Confidentiality, Nonsolicitation, and Intellectual Property Ownership Agreement." That agreement provides in pertinent part as follows:

I agree as follows: ... that I will not solicit or encourage Schwab's employees or Schwab's clients to leave Schwab. ...

The scope of these obligations, and some of the possible consequences for breaching them, are described in more detail below. ...

Agreement Not to Solicit. While I work for Schwab and for 18 months after my employment ends, I will not directly or indirectly solicit or induce ... any Schwab employee or contingent worker to leave his or her employment or engagement with Schwab.

The agreement further specifies that violation of this provision will result in liquidated damages in the amount of 75% of the most recent full year's total annual compensation paid by Schwab to any employee solicited or induced to leave his or her employment.

The Employer asserts that this provision is necessary to protect its legitimate business interest in retaining its highly trained workforce, who spend years developing relationships with particular clients, in a very competitive industry.

## **ACTION**

We conclude that the Region should dismiss the charge, absent withdrawal, because employees would not reasonably construe the Employer's rule prohibiting them from soliciting their fellow employees to leave their employment to restrict protected activity.

Initially, we note that the Board applies the same Lutheran Heritage Village<sup>1</sup> analysis to an employer-mandated employment agreement that it applies to other unilaterally implemented workplace rules alleged to violate Section 8(a)(1).<sup>2</sup> Under that analysis, the Board utilizes a two-step inquiry to determine whether an employer has unlawfully maintained a rule that would reasonably tend to chill employees in the exercise of their Section 7 rights.<sup>3</sup> First, a rule is clearly unlawful if it explicitly restricts Section 7 protected activities. Second, if the rule does not explicitly restrict protected activities, it will nevertheless violate Section 8(a)(1) upon a showing that: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."<sup>4</sup> The Board will not find a violation simply because a rule could conceivably be read to restrict Section 7 activity, and contain no limiting language or context that would clarify to employees that they do not restrict their Section 7 rights, are unlawful.<sup>6</sup> In contrast, rules that clarify and

<sup>&</sup>lt;sup>1</sup> Lutheran Heritage Village-Livonia, 343 NLRB 646, 646-47 (2004).

<sup>&</sup>lt;sup>2</sup> See, e.g., D.R. Horton, Inc., 357 NLRB No. 184, slip op. at 4 (Jan. 3, 2012) (applying the Lutheran Heritage Village test to employer's mandatory arbitration agreement imposed as a condition of employment); NLS Group, 352 NLRB 744, 745 (2008) (finding a confidentiality provision in an employment agreement unlawful under Lutheran Heritage Village), incorporated by reference in 355 NLRB 1154 (2010), enforced, 645 F.3d 475 (1st Cir. 2011).

<sup>&</sup>lt;sup>3</sup> Lutheran Heritage Village-Livonia, 343 NLRB at 646-47.

<sup>&</sup>lt;sup>4</sup> *Id*. at 647.

<sup>&</sup>lt;sup>5</sup> *Id*.

<sup>&</sup>lt;sup>6</sup> See University Medical Center, 335 NLRB 1318, 1320-1322 (2001) (work rule that prohibited "disrespectful conduct" towards supervisors and other individuals unlawful

restrict their scope by including examples of clearly illegal or unprotected conduct, so that they would not reasonably be construed to cover protected activity, are not unlawful.<sup>7</sup>

Here the contested agreement does not explicitly restrict Section 7 protected activity. And there is no evidence that it was adopted in response to protected activity or has been applied to restrict the exercise of Section 7 rights. Further, we conclude that employees would not reasonably construe the provisions at issue to interfere with or restrict protected activity because solicitation or inducement of employees to leave their employment is not protected activity.

The Board has held that attempts to induce a co-worker to quit and take a job with another employer do not constitute protected activity.<sup>8</sup> Thus, in *Abell Engineering & Mfg.*, the Board held that the respondent employer did not violate the Act by discharging an employee for attempting to recruit his co-worker to work for another employer who had a union contract, where the discharged employee had ceased his organizing activity, was not seeking to improve the respondent's terms and conditions of employment, and his attempt, if successful, would have been "deeply injurious" to the respondent.<sup>9</sup>

In reaching its decision in *Abell*, the Board distinguished a line of prior cases in which employers were found to have violated the Act by disciplining employees for contacting their co-workers about employment elsewhere in connection with other

because it included "no ... limiting language which removes [the rule's] ambiguity and limits its broad scope"), enforcement denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003).

<sup>&</sup>lt;sup>7</sup> See Tradesmen International, 338 NLRB 460, 460-461 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging" conduct would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity).

<sup>&</sup>lt;sup>8</sup> Abell Engineering & Mfg., 338 NLRB 434, 434-35 (2002) (employer did not unlawfully discharge employee for attempting to induce a co-worker to quit and take another job because employee's conduct exceeded the Act's protection); Clinton Corn Processing, 194 NLRB 184, 185-86 (1971) (former employee who went to work for employer's competitor was not protected when he solicited his former coworkers to work for his new employer).

<sup>&</sup>lt;sup>9</sup> 338 NLRB at 434.

Section 7 activity. 10 In some of these cases, the Board found such conduct protected because it was in furtherance of the employees' position in an ongoing labor dispute. 11 In other cases, the activity was found protected because it was part of an effort to improve terms and conditions of employment at the respondent employer or to protect the employment of the unit employees. 12 For example, in Arlington Electric, the respondent was found to have unlawfully discharged an employee for protected activity that included distribution of a union flyer advertising union-scale employment elsewhere. 13 The administrative law judge determined that the discriminatee "was attempting to induce the employees to seek higher wages and better working conditions" and was not, as the respondent asserted, trying to "strip" the employer of its employees. 14 Similarly, in Technicolor Services, the employer violated the Act by discharging a union steward for distributing employment applications for a competitor where the union's interest was in continued employment for the unit employees in the event the respondent lost its government contract and "not the displacement of the Respondent." In finding the violation, the administrative law judge specifically stated that, "the distribution of the applications here did not constitute a solicitation to quit nor was the distribution accompanied by a solicitation to quit which would remove the Act's protection."16

<sup>&</sup>lt;sup>10</sup> *Id.* at 435, n.3.

<sup>&</sup>lt;sup>11</sup> See Boeing Airplane Company, 110 NLRB 147, 149-51 (1954) (employer unlawfully discharged employee who organized conference to match unit employees with prospective employers as a means of exerting leverage in bargaining, and to counter employers' "gentlemen's agreement" not to hire each others' employees), enf. denied, 238 F.2d 188 (9th Cir. 1956). See also QIC Corporation, 212 NLRB 63 (1974) (group of employees did not lose protection by seeking employment from a competitor in connection with their concerted efforts to secure a hearing from the employer regarding a pay dispute);

<sup>&</sup>lt;sup>12</sup> See, e.g., Arlington Electric, 332 NLRB 845, 846, 850-852 (2000); Technicolor Services, 276 NLRB 383, 387-89 (1985), enforced, 795 F.2d 916 (11th Cir. 1986).

<sup>13 332</sup> NLRB at 846, 850-52.

<sup>&</sup>lt;sup>14</sup> Id. at 851.

<sup>&</sup>lt;sup>15</sup> 276 NLRB at 388.

<sup>&</sup>lt;sup>16</sup> Id. at 389.

In contrast, the rule here applies only to solicitations to quit. The provisions at issue prohibit employees, while they are working for the Employer and for eighteen months after they leave the Employer, from soliciting or inducing any other employee to leave their employment with Schwab. Because the prohibited conduct is not activity protected by Section 7, and the provisions would not reasonably be interpreted to extend to protected activity, the maintenance of these provisions does not violate Section 8(a)(1).

/s/ B.J.K.